Supreme Court, U. S.
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IN THE

UNITED STATES SUPREME COURT

October Term, 1978

No. 78-1671

STATE OF NEW MEXICO, ex rel.
DODSON INSURANCE GROUP,

Appellant,

v.

THE HONORABLE JAMES A. MALONEY,
JUDGE OF THE DISTRICT COURT,
SECOND JUDICIAL DISTRICT,

Appellee.

On Appeal From
The Supreme Court of New Mexico

MOTION TO DISMISS OR REMAND

and

SUPPORTING BRIEF

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IN THE UNITED STATES SUPREME COURT

STATE OF NEW MEXICO, ex rel. DODSON INSURANCE GROUP, Appellant,	)	
v.	)	No. 78-1671
THE HONORABLE JAMES A. MALONEY, JUDGE OF THE DISTRICT COURT, SECOND JUDICIAL DISTRICT, Appellee.	)	

MOTION TO DISMISS OR TO REMAND

Appellee moves the Court, pursuant to Rule 16 of the rules of this Court, for an order dismissing the appeal. As grounds for this motion, Appellee states that the appeal is not within the jurisdiction of this Court, because it is not taken in conformity to statute; that the question to be presented on appeal is moot; and that the

appeal does not present a substantial federal question.

In the alternative, Appellee moves the Court to remand this action for trial on its merits pending the determination by this Court of the constitutional question asserted by Appellant, on the ground that the trial of this action cannot be affected by the result of this appeal and the trial should not be delayed until after the appeal has been decided.

Respectfully submitted,

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IN THE UNITED STATES SUPREME COURT

STATE OF NEW MEXICO, ex rel. DODSON INSURANCE GROUP, Appellant, v. THE HONORABLE JAMES A. MALONEY, JUDGE OF THE DISTRICT COURT, SECOND JUDICIAL DISTRICT, Appellee.	No. 78-1671

ON APPEAL FROM THE
SUPREME COURT OF NEW MEXICO

BRIEF IN SUPPORT OF MOTION
TO DISMISS OR TO REMAND

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POINT I

THE APPEAL SHOULD BE DISMISSED BECAUSE IT IS NOT WITHIN THE JURISDICTION OF THIS COURT, NOT HAVING BEEN TAKEN IN CONFORMITY TO STATUTE

A. The Order Appealed From is Not a Final Judgment.

SUMMARY: The appellant purports to appeal from a state court order quashing a writ of superintending control, which order is not final and appealable.

By this appeal, appellant (the "insurer") seeks to challenge the constitutional validity of that portion of the New Mexico Workmen's Compensation Act which requires the workmen's compensation insurance carrier, or the employer itself if self-insured, to bear the cost of discovery authorized by the trial court. N. M. Stat. Ann. § 52-1-34 (1978). The order from which the insurer seeks to appeal is an order of the New Mexico Supreme Court quashing an

alternative writ of superintending control which it had previously issued (Appendix to jurisdictional statement, p. 16). In seeking that writ, the insurer contended that the trial court, by ordering the insurer to pay for a deposition which was to be taken by the claimants, had incorrectly interpreted the statute. Alternatively, the insurer contended that the statute violated the state and federal constitutions. The New Mexico Supreme Court issued an alternative writ, on an ex parte basis, and directed the trial court not to proceed with any discovery by the claimants at the cost of the insurer (See record certified by New Mexico Supreme Court). After hearing argument, the New Mexico Supreme Court quashed the alternative writ on the ground that it had been improvidently issued.

The function of a writ of superintending control under New Mexico law is to see that inferior courts do not depart from proper judicial activity, become dictatorial or oppressive

in their conduct, or otherwise behave improperly so as to shake public confidence in the administration of justice and the judiciary. STATE ex rel. ANAYA v. SCARBOROUGH, 75 N.M. 702, 410 P.2d 732 (1966). The power of superintending control may be invoked when the lower court has issued an order which is erroneous, arbitrary and tyrannical, or would be gross injustice, and there is no plain, speedy and adequate remedy unless the writ is issued. STATE ex rel. SERNA v. HODGES, 89 N.M. 351, 552 P.2d 787 (1976); STATE v. ZINN, 80 N.M. 710, 460 P.2d 240 (1969). The writ of superintending control is not used to test the trial court's jurisdiction. In New Mexico, as elsewhere, the writ used to restrain an inferior court from acting without jurisdiction is the writ of prohibition. STATE ex rel. BIRD v. APODACA, 91 N.M. 279, 573 P.2d 213 (1977).

The order of the New Mexico Supreme Court quashing the writ of superintending control, from which order

the insurer seeks to appeal, is not a final judgment within the meaning of 28 U.S.C. § 1257. The insurer's jurisdictional statement cites, at pages 2 and 3, several cases for the proposition that the judgment of a highest state court in a proceeding involving a writ of prohibition is final and appealable. Those cases are all inapposite. Cases which deal with writs of prohibition necessarily involve the jurisdiction of the inferior court. This Court has traditionally held that a final state court determination as to a lower court's jurisdiction is final and appealable. In contrast, the proceeding in the New Mexico Supreme Court, which resulted in the order from which the insurer seeks to appeal, had nothing to do with the jurisdiction of the trial court. In that proceeding neither the argument of the insurer nor the order of the New Mexico Supreme Court addressed the question of the trial court's jurisdiction. The cases holding that final decisions in state court prohibition

proceedings are appealable are thus of no benefit here.

SUMMARY: The order from which the appellant seeks to appeal is interlocutory because it does not finally resolve the ultimate issues in the case.

The determination whether a judgment is final and appealable within the meaning of 28 U.S.C. § 1257 is a question purely of federal law. GOTTHILF v. SILLS, 375 U.S. 79 (1963). For a judgment of a state appellate court to be final and reviewable by this Court, that judgment must end the litigation on the merits by finally determining the rights of the parties, so that nothing remains to be done by the trial court except the ministerial act of entry of the judgment which the appellate court has directed. GOSPEL ARMY v. CITY OF LOS ANGELES, 331 U.S. 543 (1947); CATLIN v. UNITED STATES, 324 U.S. 229 (1945). The requirement of finality is not satisfied even when "the major issues in a case have been decided

and only a few loose ends remain to be tied up - for example, where liability has been determined and all that needs to be adjudicated is the amount of damages." REPUBLIC NATURAL GAS CO. v. STATE OF OKLAHOMA, 334 U.S. 62 (1948). None of the major issues in this case has yet been decided by the trial court.

In determining the appealability of the order of the New Mexico Supreme Court, this Court should consider the substance and the underlying subject matter of that order. The insurer's proceeding in the New Mexico Supreme Court was an attack not on any determination of the merits of the case, but rather on the propriety of a discovery order. Matters relating to discovery are interlocutory, not final, and are therefore not appealable. BROWNING DEBENTURE HOLDERS' COMMITTEE v. DASA CORP., 524 F.2d 811 (2d Cir. 1975); GIALDE v. TIME, INC., 480 F.2d 1295 (8th Cir. 1973); GOSA v. SECURITIES INVESTMENT CO., 449 F.2d 1330 (5th Cir.

1971). As the Second Circuit noted in AMERICAN EXPRESS WAREHOUSING, LTD. v. TRANSAMERICA INSURANCE CO., 380 F.2d 277 (2d Cir. 1967), the sound reasons for denying appeal from discovery orders include elimination of unnecessary appeals, since the complaining party may win the case or settle it, the potential for harassment of litigants by nuisance appeals, and the fact that any appeal tends to delay or deter final resolution of a lawsuit.

The general purpose of the finality requirement of 28 U.S.C § 1257 was explained as follows in RADIO STATION WOW, INC. v. JOHNSON, 326 U.S. 120 (1945):

> This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. This

> prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State court. Here we are in the realm of potential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted this Court the power to intervene in State litigation only after 'the highest court of a State in which a decision in the suit could be had' has rendered a 'final judgment or decree.' § 237 of the Judicial Code, 28 U.S.C § 344(a). This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our Federal system. 326 U.S. at 124.

Although the concept of finality has been expanded in recent years, the basic policy remains intact. Six years ago, the Court in NORTH DAKOTA STATE BOARD OF PHARMACY v. SNYDER'S DRUG STORES, INC., 414 U.S. 156 (1973), observed that the finality requirement avoids piecemeal review by federal courts of state court decisions, avoids

the giving of advisory opinions where no case or controversy exists, and limits federal review of state court decisions on constitutional questions so as to minimize federal intrusion in state affairs. Under the general principles of finality to which this Court has adhered for many years, the order of the New Mexico Supreme Court simply cannot be construed as final and appealable, or as justifying federal intrusion in state affairs.

The insurer's suggestion that it may never obtain proper review of the trial court's action is specious. This is a case that remains to be tried on its merits, regardless of the outcome of this appeal. Nothing in the order of the New Mexico Supreme Court suggests that the insurer would not be free to raise the question of the constitutionality of the challenged statute in the appellate courts of the State of New Mexico following the entry of judgment after trial on the merits. Even if the insurer were to prevail on the liability

issues, yet be assessed the costs of the claimants' discovery, the insurer would have a right of appeal from that portion of the judgment taxing costs against it, see RUIDOSO STATE BANK v. BRUMLOW, 81 N.M. 379, 467 P.2d 395 (1970), and could squarely raise the constitutional question in that appeal. New Mexico law holds that a writ of superintending control does not perform the office of an appeal. STATE ex rel. TRANSCONTINENTAL BUS SERVICE v. CARMODY, 53 N.M. 367, 208 P.2d 1073 (1949). Appeal within the appellate courts of New Mexico would be a proper way for the insurer to obtain further state review of the constitutional question. The order of the New Mexico Supreme Court is interlocutory only, in that it does not address the question of the relief, if any, which is ultimately to be accorded to the plaintiffs. Review of interlocutory orders must await appeal from the final judgment in the case. GENERAL ELECTRIC CO. v. MARVEL RARE METALS CO., 287 U.S. 430 (1932).

B. The Order Appealed From Was Not a Ruling in Favor of the Validity of the Challenged Statute.

SUMMARY: The order from which the appellant seeks to appeal did not determine that the challenged statute is constitutional.

The statute under which the insurer claims a right to appeal, 28 U.S.C. § 1257, requires, in addition to a final judgment, a judgment which determines that the challenged state statute is not repugnant to the federal constitution. This Court has jurisdiction on appeal only if the question of the constitutionality of the statute has been "actually considered and decided" by the highest state court. See CHARLESTON FEDERAL SAVINGS AND LOAN ASSOCIATION v. ALDERSON, 324 U.S. 182 (1945); MANHATTAN LIFE INSURANCE CO. v. COHEN, 234 U.S. 123 (1914). The determinative question is thus not whether the constitutional issue was argued, as the insurer suggests, but rather whether that issue was heard and determined.

The order of the New Mexico Supreme Court gives no indication that the question of the constitutional validity of the statute attacked by the insurer was actually considered and decided. The appellate jurisdiction of this Court does not extend to judgments which do not clearly appear to have upheld a state law against constitutional attack. Appellate jurisdiction cannot be based on surmise as to the basis of the state court's ruling. LYNCH v. PEOPLE OF NEW YORK ex rel. PIERSON, 293 U.S. 52 (1934). This Court said in LYNCH that:

> It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the

> determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. [Citing cases] 293 U.S. at 54.

Whether the order of the New Mexico Supreme Court was based to any extent upon consideration of the federal constitutional question is a matter of surmise. One can logically assume that the basis for quashing the alternative writ of superintending control was the New Mexico court's determination to let the underlying action proceed and to postpone consideration of the constitutional question until after a trial on the merits. This Court may properly refuse to take jurisdiction when the highest court of a state has delivered no opinion and the judgment might have been based on a non-federal ground. DURLEY v. MAYO, 351 U.S. 277 (1956); STEMBRIDGE v. GEORGIA, 343 U.S. 541 (1952). Because the order of the New Mexico Supreme Court leaves to conjecture the ground on which it was

based, one cannot say that the validity of the challenged statute has been upheld. The order of that court is therefore not an appealable judgment or decree.

POINT II

THE APPEAL SHOULD BE DISMISSED BECAUSE THE ISSUE SOUGHT TO BE DECIDED IS MOOT

SUMMARY: Events which occurred in the trial court since the notice of appeal was filed have mooted the question presented by the appellant.

The sole question which the insurer seeks to raise in this appeal is the constitutionality of that provision of the New Mexico Workmen's Compensation Act which requires an employer or its insurance carrier to bear the cost of any discovery authorized by the trial court. That question arose because the trial court entered the discovery order which appears at page 17 of the appendix to the insurer's jurisdictional statement. As the insurer correctly points

out, the claimants in the underlying workmen's compensation action have now withdrawn their request for discovery in an effort to get their case to trial without the delay which would inevitably result from the insurer's effort to have this Court decide the constitutionality of the New Mexico statute. Reproductions of the claimants' withdrawal of their discovery motion, and their motion to vacate the trial court's discovery order, are appended hereto at pages 30 and 33.

The insurer's objection to the proceedings in the trial court is that the trial judge ordered the insurer, in advance of a determination of the insurer's liability, to pay the cost of a deposition to be taken by the claimants. Because the claimants formally waived their right to take that deposition at the cost of the insurer, the question of the trial court's authority to require the insurer to bear the cost of the deposition is now moot. The claimants determined that getting their

case to trial without procedural delays which cause the loss of evidence, because of the fading of memories and the unavailability of witnesses, was more important than obtaining the discovery which they sought. Because the claimants withdrew their discovery motion, the decision of this Court on the constitutional question would have no effect whatsoever on the trial of the underlying action.

SUMMARY: The requirement of a continuing case or controversy is not satisfied in this action because the plaintiffs below have abandoned their rights under the statute which is claimed by the appellant to be unconstitutional.

This Court has long held that its authority is limited by the "case or controversy" requirement of U.S. Const. Art. III, § 2. As the Court said in MILLS v. GREEN, 159 U.S. 651 (1895):

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into

> effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. 159 U.S. at 653.

The MILLS rationale was restated in KIMBALL v. KIMBALL, 174 U.S. 158 (1899), in which the Court stated that it "is not empowered" to decide moot questions or abstract propositions, or to declare for use in future cases, rules of law which cannot affect the result as to the thing in issue in the case presently before the Court.

The constitutional limitation against deciding moot questions has been reaffirmed by the Court in recent years. The Court has stated that it is limited by the case or controversy requirement of Article III to the adjudication of actual disputes between adverse parties, RICHARDSON v. RAMIREZ, 418 U.S. 24 (1974), and that Article III requires those who invoke the jurisdiction of any federal court to show the

existence of an actual case or controversy. O'SHEA v. LITTLETON, 414 U.S. 488 (1974). Considerations of prematurity and abstractness will cause the Court to decline appellate jurisdiction if the appellant is not being injured by the challenged statute. SOCIALIST LABOR PARTY v. GILLIGAN, 406 U.S. 583 (1972).

In one of the leading mootness decisions in recent years, DeFUNIS v. ODEGAARD, 416 U.S. 312 (1974), the Court noted that the question of mootness, even in cases arising in the state courts, remains a question of federal law, and must be decided in light of the Article III limitation. This rule applies, the Court said, even if the state court might decide the question because of "great public interest." Significant to the issues in this case was the DeFUNIS Court's observation that an actual controversy is required at all stages of appellate review, not merely at the date on which the action is initiated. The Court concluded that the case before it was moot, because the

controversy between the parties had ceased to be definite and concrete and no longer touched the legal relations of parties having adverse legal interests.

Assuming that a definite and concrete dispute existed between the parties to the workmen's compensation action which underlies this appeal, that dispute has now ceased to exist. The claimants have mooted this action by filing a written withdrawal of their discovery motion, and by moving to vacate the order which the insurer seeks to challenge in this Court. The insurer attempts to rescue this case from the jaws of mootness by suggesting that the claimants may change their minds and again seek to have the insurer pay for their discovery costs. Appellate jurisdiction should not be based on speculation as to an event which does not appear likely to occur. The claimants have represented, and continue to represent to the trial court, to the Supreme Court of New Mexico, and now to this Court, that they have abandoned

their claim of right to undertake, at the insurer's cost, the discovery sought in their motion.

This Court does not sit to decide arguments after events have put them to rest. DOREMUS v. BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, 342 U.S. 429 (1952). No difficulty exists in concluding that an issue is moot if a party pursuing a particular claim chooses to drop that claim completely. 13 Wright, Miller and Cooper Federal Practice and Procedure § 3533, at 738 (1975); see LUNZ v. PREISER, 524 F.2d 289 (2d Cir. 1975). This Court should not countenance the insurer's effort to continue litigating an issue which has disappeared from the case. As the Court said in KIMBALL v. KIMBALL, supra, there is "no reason for this Court's assuming to decide a question, the decision of which cannot affect the relief to be ultimately granted in this case."

POINT III

THE APPEAL SHOULD BE DIMISSED BECAUSE IT PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

SUMMARY: No substantial federal question is involved in this case because of the mootness of the issue sought to be raised.

This Court has for many years followed the rule that it will decline to entertain a case which, although otherwise within the Court's appellate jurisdiction, raises no substantial federal question. ZUCHT v. KING, 260 U.S. 174 (1922); EQUITABLE LIFE ASSURANCE SOCIETY v. BROWN, 187 U.S. 308 (1902). An appeal will be dismissed if resolution of the constitutional issues presented by the appellant would not be appropriate in the circumstances of the case. DeBACKER v. BRAINARD, 396 U.S. 28 (1969). The question of the constitutional validity of the discovery provisions of the New Mexico Workmen's Compensation Act, in the factual context of this case, is so insubstantial as to

be unworthy of further consideration by this Court.

The existence of a substantial federal question requires more than the mere assertion of a claim in respect of some constitutional right. There must be a real and substantial controversy of the required character which deserves serious consideration. UNITED STATES FIDELITY AND GUARANTY CO. v. STATE OF OKLAHOMA, 250 U.S. 111 (1919); NEW ORLEANS WATERWORKS CO. v. STATE OF LOUISIANA, 185 U.S. 336 (1902). A real, as distinguished from fictitious, federal question is essential to this Court's jurisdiction over the judgments of state courts. SAWYER v. PIPER, 189 U.S. 154 (1903). This court noted in SAWYER that, without such a requirement, a federal question might be set up in almost any case and the jurisdiction of this Court invoked "simply for the purpose of delay."

One factor to be considered in determining the existence of a substantial federal question is whether the

case presents a live, concrete dispute. No substantial federal question is involved if the possible invasion of the appellant's constitutional rights is wholly a matter of conjecture. ABRAMS v. VAN SCHAICK, 293 U.S. 188 (1934). By relinquishing their right to conduct discovery at the insurer's expense, the claimants in the underlying case have made moot the question presented by the insurer. A merely abstract or moot federal question is not a substantial federal question. LITTLE v. BOWERS, 134 U.S. 547 (1890). The Court in LITTLE, quoting from an earlier opinion of Chief Justice Taney, said:

> It is the office of courts of justice to decide the rights of persons and of property, when the persons interested cannot adjust them by agreement between themselves, and to do this upon the full hearing of both parties. And any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court.

The insurer's desire to continue litigating an issue which the claimants have conceded, evidences nothing more than a purpose to cause delay. A case which is flawed by such a purpose presents no substantial federal question. The insurer's appeal should therefore be dismissed.

POINT IV

EVEN IF THE APPEAL IS NOT DISMISSED, THE UNDERLYING ACTION SHOULD BE REMANDED FOR TRIAL

SUMMARY: If this appeal is within the Court's jurisdiction, the plaintiffs below should not be prevented from trying their lawsuit before the appeal is concluded, the result of the appeal being immaterial to the issues to be tried.

The claimants in the underlying workmen's compensation action have waived or abandoned their right to conduct, at the cost of the insurer, the discovery sought in their motion. The claimants are prepared to try the case on its merits, without such discovery at the insurer's cost. Therefore, even if this Court were to note probable jurisdiction to decide the constitutional question asserted by the insurer, no reason would exist why the case could not simultaneously proceed to trial on the question of the insurer's liability to the claimants for workmen's compensation. Appellee respectfully requests the Court, if it determines that the constitutional issue is properly before it, to partially remand the case for trial on the merits.

The concept of allowing a trial court to proceed to hear and determine certain aspects of a case, while at the same time another aspect of the case is pending before an appellate court, is a familiar one in the law. Jurisdiction

as to an entire cause is not transferred in a proceeding in a federal appellate court for the review of an incidental or interlocutory matter, and such an appeal does not divest the trial court of a jurisdiction to proceed with matters not involved in the appeal. EX PARTE NATIONAL ENAMELING AND STAMPING CO., 201 U.S. 156 (1906); UNITED STATES v. CITY OF CHICAGO, 534 F.2d 708 (7th Cir. 1976); COMPANIA ESPANOLA DE PETROLEOS v. NEREUS SHIPPING, 527 F.2d 966 (2d Cir. 1975), cert. den. 426 U.S. 936 (1976); DePINTO v. PROVIDENT SECURITY LIFE INSURANCE CO., 374 F.2d 50 (9th Cir. 1967). Appellee requests that this Court authorize the kind of procedure followed in GRAND CENTRAL MINING CO. v. MAMMOTH MINING CO., 36 Utah 364, 104 P. 573 (1909), in which one portion of the case was allowed to proceed to trial while another portion was pending in this Court.

The notion that the pendency of an appeal need not divest a trial court of all jurisdiction has been approved by

at least one state court in the context of a workmen's compensation action. The reasoning of the Arizona Supreme Court in CONTINENTAL CASUALTY CO. v. THE INDUSTRIAL COMMISSION, 111 Ariz. 291, 528 P.2d 817 (1974), is persuasive here. In that case, the court held that the Industrial Commission retained jurisdiction to consider those matters not directly involved in the case pending in the appellate court. Quoting from the opinion of the Arizona Court of Appeals in an earlier case, the court said:

> By allowing the trial court to proceed with issues not directly involved in, or the subject matter of the appeal, the jurisdiction of the appellate court is adequately protected, and at the same time the trial court proceedings are not inordinately delayed pending the appellate decision. 528 P.2d at 820.

Inordinate delay is especially harmful in actions which, like a workmen's compensation action, are entitled

by statute to be advanced on the trial court's calendar and tried in as summary a fashion as possible. N.M. Stat. Ann. § 52-1-35 (1978). In order to avoid inordinate delay, appellee submits that this Court can properly remand for trial even if it takes jurisdiction to decide the constitutional question.

CONCLUSION

This case is not within the appellate jurisdiction of this Court. The order from which the insurer purports to appeal is not an appealable order. The question presented by the appeal is moot. A substantial federal question is lacking. Appellee therefore respectfully requests this Court to dismiss the appeal, and to direct the New Mexico Supreme Court to vacate its writ of prohibition which restrains the trial court from proceeding any further with the case, pending the final resolution of this appeal. In the alternative, appellee requests that this Court, if it notes probable jurisdiction, remand the

underlying workmen's compensation action to the New Mexico Supreme Court with instructions to allow the trial court to hear the action on its merits, without having to await this Court's decision on this appeal.

Respectfully submitted,

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I hereby certify that three copies of the foregoing motion to dismiss or to remand, and brief in support thereof, were hand delivered this _____ day of _____, 1979 to counsel of record for appellant, and that all parties required to be served have been served.

Ronald Segel

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

ELIZABETH COWPER, et al.,
Plaintiff,
v.
No.CV-78-06242
NEW MEXICO RESTAURANT ASSOCIATION, INC., employer, and DODSON INSURANCE GROUP, insurer,
Defendant.

STAMP
Filed in My Office This
March 7, 1979
Eloise E. Young,
Clerk District Court

WITHDRAWAL OF MOTION

Plaintiffs having filed a motion for discovery on November 27, 1978, in order to obtain reasonable and necessary discovery before trial, an order having been entered on December 14, 1978

allowing such discovery at defendant's cost, defendant insurer having unsuccessfully sought review of that order in the New Mexico Supreme Court by way of prerogative writ, defendant insurer having suggested to the Court that an appeal involving the December 14, 1978, discovery order may be taken to the United States Supreme Court and now having filed notice of such an appeal, this Court having refused to allow plaintiffs to conduct discovery since the entry of the December 14, 1978, order, and it appearing to plaintiffs that this Court may decline to try their workmen's compensation claim as scheduled on March 26, 1979 because of the pendency of such appeal to the United States Supreme Court, plaintiffs therefore withdraw their motion for discovery and consent that this action may proceed to

trial without their being allowed to conduct the discovery authorized by this Court's order of December 14, 1978.

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By_____
Ronald Segel
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STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

ELIZABETH COWPER, et al., Plaintiff, v. Defendant.	No.CV-78-06242 Filed in My Office This March 7, 1979 Eloise E. Young, Clerk District Court

MOTION TO VACATE DISCOVERY ORDER

Plaintiffs move the Court to vacate the discovery order entered on December 14, 1978 upon their motion, on the ground that plaintiffs have withdrawn their discovery motion in

order that this case may proceed to trial as scheduled on March 26, 1979.

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